No. 87-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KAMLESHWAR UPADHYA,

Petitioner,

v.

DONALD N. LANGENBERG, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

THERE IS NO ISSUE OF "FACT" WHICH PRECLUDES REVIEW OF THE QUESTION OF WHETHER PETITIONER ACQUIRED A PROPERTY INTEREST IN HIS EMPLOYMENT.

Respondents seek to avoid review by this Court by arguing that this case turns only on the Seventh Circuit's ruling that the District Court was "clearly erroneous" in

finding that Dr. Upadhya had been promised a five-year employment term.[1] Both respondents and the Seventh Circuit are wrong.

In proceeding as if the District Court based its decision solely on an "express promise" by agents of the University (A. 8), the Seventh Circuit and respondents create a strawman and then attack it by focusing on the claimed absence of an express promise in the record. This approach fails. It completely misstates the District Court's careful and detailed Findings of Fact which are based on testimony from both sides which "did not materially differ . . ." (Finding No. 20, A. 35).

The District Court did not base its decision on an express contract. Rather, the District Court clearly held that the prehiring representations to Dr. Upadhya, coupled with the acts of the parties in reliance thereon, constituted an implied contract for five years under Illinois law (Conclusion 6a, A. 43).[2]

The virtually uncontested record testimony established that, during Dr. Upadhya's prehiring interviews, Dr. McMallan, the faculty member responsible for Dr. Upadhya during his visit to the University, Dr. Wu, the Department Head who had the authority to offer him the job, and Dr. Danyluk all described the assistant professorship as a position that carried a five-year period during which Dr. Upadhya would have the opportunity to demonstrate that he deserved tenure.

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[1] This Reply Brief is concerned only with this question since respondents' other arguments are adequately covered in the Petition.

[2] The District Court also held that the "institutional common law" afforded yet another basis for Dr. Upadhya's claim (Conclusion of Law 8, A. 43).

During more than three days on the witness stand, despite vigorous cross-examination, Dr. Upadhya never deviated from his testimony that the three faculty members had urged him to pursue the assistant professorship rather than an associate professorship because an assistant professorship would afford five years. Drs. Wu, McMallan, and Danyluk all testified at length, and did not deny this testimony.

The District Court correctly found that these prehiring representations were unequivocal descriptions of a "product" Dr. Upadhya was about to "buy", i.e. an assistant professorship at the University. The District Court found that the clear representations of a five year term and the uncontested fact that all of the respondents concealed the existence of the University Statutes on which they now rely, created an implied employment contract for a period of five years. (A. 21-22)

Respondents and the Seventh Circuit insist that the District Court was wrong and that Dr. Upadhya's claim fails because these representations were only "vague statements" and, therefore, did not constitute a promise (A. 7). They add the gratuitous point that Dr. Wu did not tell Dr. Upadhya whether the five years was a maximum or minimum (A. 9). But there was no reason for such an embellishment by Dr. Wu because the words used—"you get five years"—did not raise any doubt as to whether the period was a maximum or minimum. In plain English, as the District Court found, the representations described a set and distinctly "non-vague" period of five years.[3]

[3] This case is easily distinguishable from *McElearney v. University of Illinois*, 612 F.2d 285 (7th Cir. 1979) where a professor claimed an entitlement to tenure based solely on his superiors' post-hiring "vague statements" that he had been making satisfactory progress.

The law of implied contract exists for the very purpose of imposing legal obligations on a party where that party's actions show an intent to be bound even if no express promissory words are used. See *In re Estate of Milborn*, 122 Ill.App.3d 688, 690, 461 N.E.2d 1075, 1077 (1984). Here, the Seventh Circuit and respondents ignore the District Court's finding that both Dr. Wu and Dr. Upadhya *intended* that Dr. Upadhya would have a five year period of employment as a set term (Finding No. 34, A. 36).

Rather, they focus on Dr. Upadhya's testimony about his conversation with Dr. Wu. Dr. Upadhya stated that Dr. Wu told him the assistant professorship would bring "five years" and the associate professorship would bring "two years". (A. 12). The Seventh Circuit, in a tortured analysis restated by respondents, elevated the transitional words, "Or—no," in Dr. Upadhya's testimony to mean that the witness "took back" the five year figure and substituted a two year period. (A. 12). Not so.

One reason that Courts of Appeals are not empowered to retry cases (*Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)) is that they were not present at trial to hear all of the testimony and to evaluate demeanor and tone of voice. Here, the District Court noted that Dr. Upadhya, a native of India who arrived in the United States only in 1982, had difficulty enunciating the English language. Nevertheless, after listening to Dr. Upadhya for several days on the witness stand, the District Court understood that Dr. Upadhya had stated clearly that Dr. Wu applied the two year period to the associate professorship and the five year period to the assistant professorship. The stumbling transitional words "Or—no," are merely a reflection of Dr. Upadhya's broken English. It is nonsense to suggest that Dr. Upadhya's syntax undercut the uncontested facts of this case.

Yet, the Seventh Circuit perused a 2500 page transcript and concluded that the District Court got the essential facts wrong because it missed the "Or—no." On the contrary, the District Court got it right; Dr. Upadhya's expectation of a five-year term was not unilateral, but was based on the unequivocal representations of Drs. Wu, McMallan, and Danyluk that the job was for five years.

Relying on *Vail v. Board of Education*, 706 F.2d 1435 (7th Cir. (1983), *aff'd by an equally divided court*, 466 U.S. 377 (1984), the District Court held that, even if there were no express promise or contract, these facts established an implied contract of five years, which gave rise to a protectible property interest under the due process clause. Thus, the issue considered by this Court in *Vail* and set forth in the instant Petition for Writ of Certiorari is clearly presented by the record here: Do Dr. Wu's and the other faculty members clear descriptions of a five year term, made to induce Dr. Upadhya to accept the job, create a property interest for purposes of the "due process clause," regardless of any limitations in the University Statutes?

As the District Court observed during the post-trial hearing, even though university department heads and professors induce applicants like Dr. Upadhya to accept jobs through representations of a set period of employment, the University believes it can free itself of any corresponding obligation to abide by those representations by falling back on the undisclosed University Statutes, as though, in the District Court's words, "we are reserving in our pocket an ace."

This is precisely the kind of arbitrary and unfair government behavior which the due process clause was intended to stop. That is why such protections apply not only to express employment contracts enforceable in a court, but

also, as stated in *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), to "mutually explicit understandings."

This Court should grant a Writ of Certiorari in this case in order to clarify that a protectible property interest can arise from the kind of pre-hiring representations made to and reasonably relied on by Dr. Upadhya, at least in circumstances where any alleged formal tenure rules are not made known to the applicant.

Respectfully submitted,

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